

STATE OF MICHIGAN  
COURT OF APPEALS

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DAVID EDWARD GOLDSTICK,

Defendant-Appellant.

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UNPUBLISHED

September 27, 2007

No. 267593

Charlevoix Circuit Court

LC No. 05-002310-FC

Before: Talbot, P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions by a jury of first-degree premeditated murder, MCL 750.316(1)(a), and possession of a firearm during commission of a felony, MCL 750.227b(1). He was sentenced to life imprisonment without parole for the first-degree murder conviction and to a consecutive two-year term for the felony-firearm conviction. We affirm.

This case arose when defendant, the quartermaster/treasurer for a Charlevoix Veterans of Foreign Wars (VFW) post, allegedly used a pistol with a homemade silencer to shoot the assistant quartermaster of the post out of fear that the victim would discover defendant's theft of funds from the post.

Defendant first argues that he should be granted a new trial because his statements to police should not have been admitted against him. He argues that, because of the stress of the situation and because he did not understand the implications of waiving his *Miranda*<sup>1</sup> rights, his waiver of those rights was invalid. He also argues that his waiver of his *Miranda* rights for an April 27, 2005, jailhouse police interview was limited to a discussion of a particular search warrant and that, therefore, all statements not related to that issue should not have been admitted. We disagree.

A trial court's legal conclusions are reviewed de novo. *People v Medlyn*, 215 Mich App 338, 340; 544 NW2d 759 (1996). A court's ultimate decision regarding a motion to suppress is also reviewed de novo. *People v Davis*, 250 Mich App 357, 362; 649 NW2d 94 (2002).

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<sup>1</sup> *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

However, a trial court's findings of fact following a suppression hearing will not be disturbed unless they are clearly erroneous. *People v LoCicero*, 453 Mich 496, 500; 556 NW2d 498 (1996). Factual findings are clearly erroneous when, based on review of the whole record, the reviewing court has a firm and definite conviction that the trial court made a mistake. *People v Brzezinski*, 243 Mich App 431, 433; 622 NW2d 528 (2000).

The right against self-incrimination is a right guaranteed by both the United States and Michigan Constitutions. US Const, Am V; Const 1963, art 1, § 17. “[A] suspect in police custody must be informed specifically of the suspect's right to remain silent and to have an attorney present before being questioned.” *People v Kowalski*, 230 Mich App 464, 472; 584 NW2d 613 (1998). If a suspect requests an attorney, interrogation must cease until an attorney is present. *Id.* However, if a defendant makes only an ambiguous or equivocal reference to an attorney, questioning may continue. *People v Granderson*, 212 Mich App 673, 677-678; 538 NW2d 471 (1995). Moreover, a limited request for counsel, such as a request for counsel for answering a specific question, does not limit police from continuing to interrogate a suspect on other topics. *People v Adams*, 245 Mich App 226, 233-235; 627 NW2d 623 (2001).

“Statements of an accused made during a custodial interrogation are inadmissible unless the accused voluntarily, knowingly, and intelligently waives [his] Fifth Amendment right.” *People v Tierney*, 266 Mich App 687, 707; 703 NW2d 204 (2005). “The prosecutor must show by a preponderance of the evidence that the defendant knowingly, intelligently, and voluntarily waived his Fifth Amendment right.” *Id.* “Whether a defendant's statement was knowing, intelligent, and voluntary is a question of law, which the court must determine under the totality of the circumstances.” *Id.*

The factors to be considered when determining whether a statement is voluntary include:

the age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse. . . .

The absence or presence of any one of these factors is not necessarily conclusive on the issue of voluntariness. The ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made. [*People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988).]

Defendant claims that when he waived his *Miranda* rights on several different occasions, he did not do so knowingly because he was stressed about the situation he was in, he was sleep-deprived, and he did not comprehend the implications of giving up those rights. However, none of those reasons negate defendant's knowing consent to waive his *Miranda* rights.

First, defendant never said his lack of sleep prevented him from intellectually understanding his rights, and there is no evidence that this was the case. Second, we disagree that the stress of being in police custody is sufficient to negate one's ability to knowingly waive one's *Miranda* rights. Thirdly, it is well established that one does not need to understand all the ramifications of waiving one's right to remain silent to validly waive it. *People v Daoud*, 462 Mich 621, 636; 614 NW2d 152 (2000).

Defendant was 57 years old, he had served in the military for over 20 years, there was nothing to indicate he did not have at least average intelligence and education, his initial statements to police were within minutes of his arrest, and his later statements were after only a day and then a week of custody. Although defendant had some physical health conditions, he had no previous mental health problems and he was not intoxicated, drugged, or injured when he was questioned. He was not deprived of food or medical attention. Moreover, while he did say he did not sleep well, there was no evidence this was from deliberate action by the police beyond their putting him in a "suicide watch" cell that did not have a regular mattress. In sum, looking at the totality of the circumstances, there is no basis for us to conclude that the statements were not voluntary.

With regard to defendant's statements in the jailhouse police interview on April 27, 2005, there was nothing to indicate that police questioned him beyond the scope of his waiver. While defendant may have been motivated to talk to police by the warrant return served on him in jail, he did not explicitly say that he was limiting the questioning to that topic. Testimony indicated that defendant did not restrict the topic of conversation at all until late in the conversation and then only said he would not talk about the .380 handgun or an audit. A limitation on certain questioning without counsel does not prevent police from continuing to question a defendant on other issues. *Adams, supra* at 233-235. Therefore, the trial court did not clearly err in finding that defendant's *Miranda* waivers were all valid and that Detective Charles Vondra did not exceed the scope of defendant's waiver when he questioned defendant on April 27, 2005.

Defendant next argues that he was denied due process and a fair trial by extensive, inflammatory pre-trial publicity and that his trial counsel was ineffective for failing to move for a change of venue or to sequester the jury. We disagree.

Unpreserved error only requires reversal if it was a plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). When there is no request for an evidentiary hearing or a motion for a new trial, appellate review of a claim of ineffective assistance of counsel is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

Generally, defendants are tried in the county where the crime was committed. *People v Jendrzewski*, 455 Mich 495, 499; 566 NW2d 530 (1997); MCL 600.8312. "An exception to the rule provides that the court may, in special circumstances where justice demands or statute provides, change venue to another county." *Jendrzewski, supra* at 499-500; MCL 762.7. "Community prejudice amounting to actual bias has been found where there was extensive highly inflammatory pretrial publicity that saturated the community to such an extent that the entire jury pool was tainted, and, much more infrequently, community bias has been implied from a high percentage of the venire who admit to a disqualifying prejudice." *Jendrzewski, supra* at 500-501. Defendant has demonstrated neither situation here.

First, the news articles were primarily factual in nature. See *Id.* at 504 (distinguishing factual publicity from inflammatory or invidious publicity). Even the article containing the district court's finding of premeditation was "factual," in that it was merely reiterating the court's finding at the preliminary examination. While that particular article is somewhat troubling, it is not clear that any of the jurors saw that article, and, even if some did, all of the jurors seated on the jury stated that they could be impartial and decide the case on the merits. Moreover, defendant has not demonstrated that a particularly high percentage of the potential jurors had been exposed to news articles about the case. Under the circumstances, and in light of the fact that no change of venue was even requested, the trial court's failure to change venue was not a plain error affecting defendant's substantial rights.

Defendant also claims that defense counsel was ineffective for failing to request a change of venue. The right to counsel is guaranteed by the United States and Michigan Constitutions. US Const, Am VI; Const 1963, art 1, § 20. This is a right to effective assistance of counsel, because it is for the purpose of assisting the defense, and ineffective counsel is of no assistance. *United States v Cronin*, 466 US 648, 654-655; 104 S Ct 2039; 80 L Ed 2d 657 (1984).

To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under professional norms and that there is a reasonable probability that, in the absence of counsel's errors, the result of the proceedings would have been different. *Strickland v Washington*, 466 US 668, 687-688, 694; 104 S Ct 2052; 80 L Ed 2d 674 (1984); *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). The defendant must also show that the proceedings were fundamentally unfair or unreliable. *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). Counsel's effectiveness is presumed, and there is a high burden of proof to show otherwise. See *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Defense counsel is given wide discretion in matters of trial strategy because many calculated risks may be necessary in order to win difficult cases. *Pickens*, *supra* at 325. There is therefore a strong presumption of effective counsel when it comes to issues of trial strategy. *Strickland*, *supra* at 689. An appellate court will not second-guess matters of strategy or use the benefit of hindsight when assessing counsel's competence. See *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999).

There was little basis for requesting a change of venue. Defense counsel cannot be faulted for failing to raise a futile motion. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Plus, there could have been legitimate trial strategy reasons for keeping the same venue; it is certainly possible that there were people sympathetic to defendant in the community. In any case, defendant has not demonstrated that there was a reasonable probability that the outcome of the trial would have been different had a change of venue been requested and granted. Indeed, defendant has simply not demonstrated that a large percentage of jurors were actually exposed to extensive and inflammatory pretrial publicity. Moreover, the evidence of defendant's guilt was substantial, in that he confessed to the shooting and he used a homemade silencer on the gun. Defense counsel was not ineffective for failing to request a change of venue.

Further, defense counsel was not ineffective for failing to request sequestration, because the jury was already ordered to stay away from the media, and there is no evidence that this order was not followed by the jury. Juries are presumed to follow their instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Accordingly, there is no evidence that the result of the proceedings would have been different had the jury been sequestered. Moreover, the trial

court did not err in failing to sequester the jury sua sponte because (1) defendant did not request sequestration and (2) the trial court adequately addressed the situation by ordering the jurors to stay away from the media.

Defendant next argues that he was denied a fair trial by the introduction of evidence of an allegedly unscientific, unreliable, unhelpful experiment before the trier of fact and that his attorney was ineffective for failing to object to its admission. We disagree.

“Demonstrative evidence is admissible when it aids the fact-finder in reaching a conclusion on a matter that is material to the case. The demonstrative evidence must be relevant and probative.” *People v Bulmer (After Remand)*, 256 Mich App 33, 35; 662 NW2d 117 (2003) (citation omitted). “Beyond general principles of admissibility, the case law of this state has established no specific criteria for reviewing the propriety of a trial court’s decision to admit demonstrative evidence<sub>[,]</sub>” beyond a three-part test for admitting into evidence, for demonstration purposes, a weapon similar to the one used in the commission of a crime. *People v Castillo*, 230 Mich App 442, 444-445; 584 NW2d 606 (1998).

The test firing of the murder weapon in a makeshift silencer box similar to the one made by defendant was not a particularly complicated or novel test. It was simple enough that a lay person could not only understand the test, but could probably have designed it, so admitting it required no special scientific proofs. It is common knowledge that guns are loud and a box filled with insulation might reduce a gun’s loudness. Measuring relative sound output is also not particularly complicated, and watching the demonstration on video, it may even have been possible for jurors to tell the difference in volume between shots fired inside and outside the box just by ear. Finally, observing how effectively the box silenced the murder weapon was a matter that was material to this case. Therefore, the admission of this test into evidence was not a plain error affecting defendant’s substantial rights, and defendant is not entitled to relief based on this issue.

Defendant is also not entitled to relief based on a claim of ineffective assistance of counsel, because any objection to the introduction of this videotape would have been without merit, and there is no obligation for counsel to advocate a meritless position. *People v Rodriguez*, 212 Mich App 351, 356; 538 NW2d 42 (1995). “[T]rial counsel cannot be faulted for failing to raise an objection or motion that would have been futile.” *Fike, supra* at 182. Finally, even if the demonstration had been successfully kept out of evidence, this would not have likely altered the outcome of the case. The primary significance of the silencer was not precisely how effective or ineffective it was, but instead was the fact that it showed that defendant planned this murder in advance, establishing premeditation.

Defendant next argues that he was denied a fair trial by the introduction of a rifle and testimony related to a Bingo game the VFW conducted. Defendant argues that this evidence was unconnected to the offense and irrelevant to any proper purpose under MRE 404(b). We disagree.

A trial court’s decision whether to admit evidence is reviewed for an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999). A preliminary question of law regarding the admissibility of evidence is reviewed de novo. *Id.*

MRE 404(b)(1) sets forth the standards for the admission of other-acts evidence. It provides as follows:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

Other-acts evidence may not be used to convict a defendant based on his history of misconduct. *People v Starr*, 457 Mich 490, 494-495; 577 NW2d 673 (1998). The general rule is one of inclusion, not exclusion, because only one use of other-acts evidence is excluded, while there are several other permissible uses of such evidence. *People v VanderVliet*, 444 Mich 52, 64; 508 NW2d 114 (1993), mod on other grounds 445 Mich 1205 (1994). Other-acts evidence is only to be excluded under MRE 404(b) where its value as evidence is solely to show that defendant is a bad sort of person who has done, or is likely to do, a certain course of conduct based on that character. *Id.* at 64-65.

For evidence to be admissible under MRE 404(b), it must be offered for a proper purpose, it must be relevant, and its probative value must not be substantially outweighed by its potential for unfair prejudice. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004). A proper purpose is one other than attempting to show the defendant's propensity to commit the offense. *VanderVliet*, *supra* at 74. The prosecutor has the burden of showing the evidence is relevant. *Knox*, *supra* at 509. Admission of the evidence would be unfairly prejudicial if there is a danger that marginally probative evidence will be given undue weight by the jury. *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001).

The silenced rifle, while not used in the perpetration of this crime, was still linked to it and was not offered in violation of MRE 404(b). First, it was offered to show defendant's common plan or scheme of experimenting with ways to make homemade silencing devices for firearms. Second, defendant's desire to silence the sounds of gunshots was quite relevant to defendant's act of subsequently shooting a man while using a homemade silencer. Finally, the probative value of that evidence was extremely strong, and it was not unfairly prejudicial to introduce evidence that defendant had been experimenting with homemade silencers, likely in direct preparation to commit the offense charged in this case. This was not marginally probative evidence given undue weight; this was strong evidence directly related to defendant's actions and planning for this crime.

The Bingo testimony was also relevant to this case. This testimony was not about showing prior bad acts to impugn defendant's character; it was about acts possibly directly tied to the crime in this case. The Bingo money was part of the funds of the VFW post, funds defendant was responsible for and from which defendant allegedly stole, possibly creating the motive for defendant's actions in this case. Motive is a proper purpose under MRE 404(b). Anything pertaining to defendant's motive was relevant evidence, because it helped to explain the purpose behind defendant's alleged criminal conduct. Finally, because motive was so important, the probative value of defendant's possible theft of those funds was not substantially

outweighed by any danger of unfair prejudice. Stealing a few thousand dollars of Bingo money is a significantly less serious crime than first-degree premeditated murder, and so it seems unlikely that finding out that defendant might have stolen some money would lead a jury to then consider defendant more likely to commit the far more serious offense, leaving aside the issue of motive.

In sum, the trial court did not abuse its discretion when it admitted into evidence the Bingo testimony and defendant's silenced rifle.

Defendant lastly argues that he was denied a fair trial by the introduction of evidence that allegedly was more prejudicial than probative – gory photographs, bloody clothes, and a graphic mannequin. We disagree.

A trial court's decision whether to admit evidence is reviewed for an abuse of discretion. *Lukity, supra* at 488. A preliminary question of law regarding the admissibility of evidence is reviewed de novo. *Id.* Unpreserved issues are reviewed for plain error affecting substantial rights. *Carines, supra* at 763-764. Reversal is required only where the error resulted in the conviction of an actually innocent defendant or when it seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id.*

Generally, relevant evidence is admissible and irrelevant evidence is not. *Starr, supra* at 497. Evidence is relevant if it makes a pertinent fact more or less likely. MRE 401; *Dep't of Transportation v VanElslander*, 460 Mich 127, 129; 594 NW2d 841 (1999). However, relevant evidence may still be excluded “if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.” MRE 403; see also *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000).

There seems to be little probative value in the photographs of the victim's bloody corpse. One cannot specifically see from the photographs exactly where or how many times the victim was shot, and they do not shed much light on the perpetrator's identity or whether the shooting was premeditated. There seems to be little reason to admit the photographs beyond an attempt to emotionally jar the jury. Therefore, the prejudicial value of the photographs was probably substantially outweighed by the danger of unfair prejudice. However, any error here was harmless, because of the overwhelming evidence against defendant, including his confession and his construction of a silencer for his gun.

The mannequin was far less prejudicial. Moreover, the mannequin gave a good illustration of the relative trajectory of each bullet in the body, something that was likely difficult to illustrate any other way, given the three-dimensional nature of the information. The bloody clothing, while not particularly probative, was also not nearly as prejudicial as the pictures of the actual bloody body at the scene. Additionally, any error concerning the introduction of the mannequin and clothing would be harmless because of the overwhelming evidence against defendant. Finally, and significantly, given defense counsel's stated lack of objection to the admission of the mannequin and clothing, the issue concerning their admission has been waived

for purposes of appeal. See, e.g., *People v Lueth*, 253 Mich App 670, 688; 660 NW2d 322 (2002).<sup>2</sup>

Affirmed.

/s/ Michael J. Talbot  
/s/ Mark J. Cavanagh  
/s/ Patrick M. Meter

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<sup>2</sup> Defendant also makes a passing, nonspecific reference to “the victim’s wife’s testimony concerning [the victim’s] past and the introduction of the reunion photograph.” He apparently believes that this evidence should not have been admitted at trial. Defendant has waived this issue, however, because of inadequate, unclear briefing and because it was not included in the statement of questions presented for appeal. *People v Hicks*, 259 Mich App 518, 532; 675 NW2d 599 (2003) (“[a] party may not announce a position on appeal and leave it to this Court to unravel or elaborate his claims”); *People v Yarbrough*, 183 Mich App 163, 165; 454 NW2d 419 (1990).